No. 379

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellants,

VS.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE BINKLEY MINING COMPANY, et al., APPELLEES.

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STATEMENT.

The Binkley Mining Company and fourteen other companies owning and operating coal mines in Indiana served by the Chicago, Milwaukee, St. Paul & Pacific Railroad, hereinafter referred to as the "Milwaukee," being vitally interested in the issues in this case, intervened as parties plaintiff in the proceeding in the District Court. (Rec. 14.) These interveners, as appellees, now urge that the

decree of the District Court herein be affirmed by this Honorable Court.

The statements of the case in the briefs for the United States and the Railroad Appellants in general set forth the nature of the proceeding before the Interstate Commerce Commission and the District Court. The statements of the appellants omit certain pertinent facts initially necessary to a consideration of the issues in this case, or contain statements which tend to confuse the facts.

Much is said in the report of the Commission and in the briefs for appellants in regard to groups and differential relationships. On page 3 in the brief for the United States in a footnote it is stated:

> "Several mines located in proximity to each other constitute a 'group,' 'origin group,' or 'rate group.' One rate applies on coal transported from all mines constituting one of these groups, and is known as a 'group rate.' (See R. 150-151, for illustration.)"

A reference to Exhibit 8 (R. 149, 154, inclusive) shows that appellants' statement in regard to groups is incorrect. For example, to the destination Forreston under the origin group Brazil-Clinton, it shows four of the railroads published a rate of $1.80, while a fifth railroad published a rate of $1.87, and that from the Linton-Sullivan group three railroads published rates of $1.85 and three railroads published rates of $1.92 to Forreston (R. 150); that to other destinations shown in said Exhibit 8, for example, to Rockford, all the railroads serving mines in the so-called Brazil-Clinton group published rates of $1.87, and all the railroads in the so-called Linton-Sullivan group published rates of $1.92. The mines are the same and the carriers are the same in each instance, but the carriers do not publish common rates from the same mines to each of the various destinations here involved.

The following tables taken from Exhibit 8 (R. 151 to 154) and Exhibit 9 (R. 154, 158) show in table I the rates of the Milwuakee in effect at the time it published its tariff suspended by the Commission headed in said Tables, "Present Rates," the rates in the tariff which were suspended, the average distance from the mines on the Milwaukee to the destinations shown in the table, the rates and average distances to the destination via carriers publishing a rate the same as that formerly published by the Milwaukee, and the rate and average distance via the carrier or carriers publishing a rate different from that formerly published by the Milwaukee; and also show the rate and average distance from the two Illinois groups to the same destinations.

TABLE I.

STATEMENT OF RATES AND DISTANCES FROM MINES IN THE BRAZIL-CLINTON GROUP AND THE CENTRAL ILLINOIS AND SOUTHERN ILLINOIS GROUPS TAKEN FROM EXHIBITS 8 AND 9.

	Clinton District			Other Carriers in Brazil-Clinton Group Publishing Same Rate as Present C.M.Ct.P.&P.		Other Rates from Brazil-Clinton		Central Illinois		Southern Illinois	
	Present Rate	Suspended Rate	Average Distance	Rate	Distance	Rate	Distance	Rate	Distance	Rate	Distance
Rockford	1.87	1.70	231	1.87	281	....	....	1.70	*245	2.00	**365
Freeport	1.87	1.70	260	1.87	314	....	....	1.70	**261	2.00	**384
Forreston	1.80	1.70	246	1.80	270	Pa. 1.87	352	1.70	284	2.00	395
Byron	1.80	1.70	228	1.80	249	Pa. 1.87	334	1.70	266	2.00	377
Davis Jct.	1.80	1.70	219	1.80	240	Pa. 1.87	325	1.70	260	2.00	368
Kirkland	1.80	1.70	206	1.80	246	....	....	1.70	244	2.00	350
Genoa	1.80	1.70	211	1.80	258	....	....	1.70	255	2.00	373
Elgin	1.80	1.70	188	1.80	237	....	....	1.70	249	2.00	377
Bensenville ...	1.80	1.70	169	1.80	217	....	....	1.70	243	2.00	366
DeKalb	1.74	1.70	194	1.74	257	....	....	1.60	224	1.90	359
Average ..	180.8	1.70	216	180.8	256.3	1.87	337	1.69	252	1.99	373

* This distance is that as shown by these Interveners. The Central Illinois operators showed the distance as 250 and 273 miles. The Commission shows the distance as 237.9 miles.

** These distances are those shown in the report of the Commission. All other distances are taken from those shown by these Interveners which are not controverted and are the only evidence as to distances to points other than Rockford and Freeport in the record and are shown in Exhibits 8 and 9.

TABLE II.

STATEMENT OF RATES AND DISTANCES FROM MINES IN THE LINTON-SULLIVAN GROUP AND THE CENTRAL ILLINOIS AND SOUTHERN ILLINOIS GROUPS TAKEN FROM EXHIBITS 8 AND 9.

	Linton District C.M.St.P.&P.			Other Carriers in Linton-Sullivan Group Publishing Same Rate as Present C.M.St.P.&P.		Other Rates from Linton-Sullivan		Central Illinois		Southern Illinois	
	Present Rate	Suspended Rate	Average Distance	Rate	Distance	Rate	Distance	Rate	Distance	Rate	Distance
Rockford ..	1.92	1.75	275	1.92	303	....	....	1.70	**245	2.00	**365
Freeport ...	1.92	1.75	304	1.92	332	....	....	1.70	*261	2.00	*384
Forreston ..	1.85	1.75	290	1.85	284(a)	1.92(b)	355	1.70	284	2.00	395
Byron	1.85	1.75	272	1.85	280(c)	1.92(d)	358	1.70	266	2.00	377
Davis Jct. .	1.85	1.75	263	1.85	313(e)	1.92(f)	349	1.70	260	2.00	368
Kirkland ..	1.85	1.75	250	1.85	274(g)	1.92(h)	301	1.70	244	2.00	350
Genoa	1.85	1.75	255	1.85	286(i)	1.92(j)	293	1.70	255	2.00	373
Elgin	1.85	1.75	232	1.85	275	....	....	1.70	249	2.00	377
Bensenville.	1.85	1.75	213	1.85	237	....	....	1.70	243	2.00	366
DeKalb	1.79	1.75	238	1.79	278	....	....	1.60	224	1.90	359
Average	185.8	1.75	260	185.8	286.3	1.92	343	1.69	252	1.99	373

(a) C. & E. I. and Big Four.
(b) Monon, I. C. and Penna.
(c) C. & E. I., Big Four and I. C..
(d) Monon and Penna.
(e) C. & E. I., Big Four and I. C.
(f) Monon and Penna.
(g) C. & E. I., Big Four, I. C., Penna.
(h) Monon.
(i) C. & E. I., Big Four, I. C., Penna.
(j) Monon.

* This distance is that as shown by these Interveners. The Central Illinois operators showed the distances as 250 and 273 miles. The Commission shows the distances as 237.9 miles.

** These distances are those shown in the report of the Commission. All other distances are taken from those shown by these Interveners which are not controverted and are the only evidence as to distances to points other than Rockford and Freeport in the record and are shown in Exhibits 8 and 9.

The statements in briefs of both appellants refer to the differential adjustment which would be disrupted by the rates published by the Milwaukee. Both statements fail to show clearly that the rates published by the Milwaukee and suspended by the Commission restored a relationship as between the mines on the Milwaukee and the mines in the central Illinois and southern Illinois groups which had existed for many years prior to the disruption caused by the reduction in the Illinois Intrastate Rates. (R. 77.)

Neither statement makes it clear that the Milwaukee published rates to 38 stations on its line in Illinois of $1.70 from mines in its Clinton district, and $1.75 from mines in its Linton district, and that Rockford and Freeport are the most distant stations from the mines on its line. Exhibit 8 (R. 149-154) shows that from the Clinton district the average distance from the Milwaukee mines ranged from 169 miles to Bensonville, Illinois, to 260 miles at Freeport, Illinois, and from the Linton mines from 213 miles to Bensonville, to 304 miles to Freeport. At the hearing before the Commission rates and distances were shown to ten of the 38 destinations as being representative of the whole. The average distance from the mines on the Milwaukee to these ten destinations was 216 miles from the Clinton district and 260 miles from the Linton district. The average distance from mines in the Central Illinois group to these ten representative destinations is 252 miles, and from the southern Illinois group 373 miles. (Ex. 13, R. 163; Ex. 14, R. 164.) The average distance from mines in the Brazil-Clinton group via carriers publishing rates equal to the former Milwaukee rates is 256 miles, and from mines in the Linton-Sullivan group 286 miles to these ten destinations. The Commission in stating the distances from the Brazil-Clinton group to these destinations included distances via carriers which published higher rates for longer

hauls than did the Milwaukee. (R. 11, 43.) The Commission in its report and order ignored all destinations except Rockford and Freeport, the most distant stations. (R. 11.) Exhibit 7 (R. 149) shows the line of the Milwaukee and the 10 representative stations considered in the exhibits introduced by the Coal Trade Association of Indiana, of which these appellees are members.

We will discuss the facts in greater detail in the course of the argument in showing that there was no evidence to support the findings of the Commission or the order of the Commission, and in showing that the findings and order of the Commission were arbitrary in that the Commission failed to consider material and uncontradicted evidence appearing of record in the proceeding.

Statutes Involved.

The statutes involved are correctly stated by appellants and are set forth as appendices to the briefs filed by appellants.

Summary of Argument.

1. A carrier within the zone of reasonableness prescribed by the statute may adjust its rates so as to obtain or retain desired traffic for its own lines. *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627. The Milwaukee has the legal right to initiate and maintain rates which are no more than reasonable maximum or no less than reasonable minimum, provided those rates do not discriminate against any person, locality or description of traffic, or do not in other ways violate the Interstate Commerce Act. The Act does not take from the carriers the right to initiate and maintain rates which are not prohibited by the Act. There is still managerial discretion in the carriers.

United States v. *Illinois Central Railroad,* 263 U. S. 516, 522.

2. Section 15 (7) of the Act, U. S. C., Title 49, provides for the suspension of rates and charges by the Commission and provides for a hearing concerning the lawfulness of such rates or charges by the Commission, and further provides that "after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it (the rate or charge) had become effective." The section further provides that in any such hearing respecting a rate increased after January 1, 1910, the burden of proof, to show that the increased rate or charge or proposed increased rate or charge is just and reasonable, shall be upon the carrier.

The provision for a hearing requires that the Commission consider the evidence and decide in accordance with such evidence. A refusal to consider evidence, or the making of an essential finding without supporting evidence is arbitrary action and an order based thereon is void. *The Chicago Junction Cases,* 264 U. S. 258, 265.

In considering a number of rates the Commission cannot reach its conclusion in respect to all of the rates based upon evidence respecting one or two of the rates, but must consider each of the rates involved. It may reach a conclusion in respect to each of the rates by considering evidence which is typical of the entire situation, if that evidence is shown to be applicable to each of the rates involved. *Beaumont, St. Louis & Western Ry. Co.* v. *United States,* 282 U. S. 76.

At such hearing the Commission can act only upon evidence of record in the particular case before it. A finding without evidence is beyond the power of the Commission and an order based thereon is contrary to law. The Commission cannot predicate a finding or order upon facts assumed to be known to the Commission from any source other than the record in the case in which finding or order

is entered. *Interstate Commerce Commission* v. *Louisville & Nashville Railway Co.*, 227 U. S. 88, 92, 93.

A finding in the language of the statute that the rates of the Milwaukee would be unreasonable and in violation of Sections 1 (5) and 15 (a) (2) of the Act in the absence of supporting findings of fact sustaining such conclusion is not sufficient to support the order requiring the cancellation of the tariff involved. *Florida* v. *United States*, 282 U. S. 194, 213.

3. The order of the Commission is not supported by the evidence. Many of the findings in the report of the Commission are not supported by evidence and some of those findings are contrary to the evidence. In reaching its conclusion the Commission failed to consider material and uncontroverted evidence.

4. The Commission has no power to adjust rates in order to destroy one district or to build up another. *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627.

5. Section 15 (a) (2) of the Act, Title 49, U. S. Code, does not declare any rate or charge unlawful and does not authorize the Commission to fix the rates of one carrier so as to divert traffic to another carrier or group of carriers. The only rates which were in issue before the Commission were those of the Milwaukee, and their lawfulness could be determined only by a consideration of those rates as applied to the service via the line of the Milwaukee, not by a consideration of service via other lines whose rates were not in issue.

ARGUMENT.

I.

A carrier has the right to initiate and maintain any rate which is within the zone of reasonableness prescribed by the Interstate Commerce Act.

The Milwaukee published the rates involved for the purpose of maintaining its traffic from mines in Indiana served by it to 38 destinations on its line in Illinois on the same relative basis as applied to competitive traffic from Illinois mines to those destinations. (R. 74.)

This Court has repeatedly held that carriers have the right to initiate rates, adopting such policy as they deem wise, so long as such rates are within the zone of reasonableness prescribed by the Act and do not violate the provisions of the Act in regard to prejudice, preference or discrimination.

In *United States* v. *Illinois Central Railroad*, 263 U. S. 516, at page 522, decided January 7, 1924, the Court said:

> "A carrier is entitled to initiate rates and in this connection to adopt such policy of rate making as to it seems wise. *Interstate Commerce Commission* v. *Chicago, Great Western Railway Company*, 209 U. S. 108, 118-119. *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433. *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 92."

In *Texas & Pacific Railway Company, et al.* v. *United States of America, et al.*, decided May 29, 1933, 289 U. S. 627, 77 L. Ed., page 1410, at page 1421, the Court said:

> "As the carriers are in competition for the business they may, within the zone of reasonableness, prescribed

by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. *Interstate Commerce Commission* v. *Alabama Midland R. Co.* (C. C. A. 5th) 74 Fed. 715, 723, 724, 5 Inters. Com. Rep. 685, 168 U. S. 144, 172, 173, 42 L. ed. 414, 425, 18 S. Ct. 45; *Skinner & E. Corp.* v. *United States*, 249 U. S. 557, 564, 63 L. ed. 772, 777, 39 S. Ct. 375; *United States* v. *Illinois C. R. Co.*, 263 U. S. 515, 522, 68 L. ed. 417, 424, 44 S. Ct. 189.

"The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination. *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 S. Ct. 666, 5 Inters. Com. Rep. 465."

The Commission's ultimate conclusion is that the rates published by the Milwaukee are unreasonable and in violation of Sections 1 (5) and 15 (a) (2) of the Interstate Commerce Act. Section 15 (a) (2) does not declare any rate to be illegal, nor does it define what is a reasonable or lawful rate. That section is merely a direction to the Commission of certain factors to be given consideration by the Commission in prescribing just and reasonable rates. It is obvious that no rate could be in violation of the Section.

Section 1 (5) provides that all charges for the transportation of property shall be just and reasonable, and declares any unjust or unreasonable charge for such service to be unlawful.

The ultimate issue therefore is whether or not the evidence in this case shows that the rates initiated by the Milwaukee are unreasonable and unjust charges for the services rendered by it in the transportation of coal from mines on its line in Indiana to these 38 destinations on its line in Illinois.

II.

In a proceeding under Section 15 (7) of the Act the Commission can enter no order until after a full hearing, and the order entered must be supported by the facts appearing from the evidence in such hearing.

Section 15 (7) of the Act (Title 49 U. S. Code) provides for the suspension of a new rate by the Commission and for a hearing concerning the lawfulness of such rate. After the hearing the Commission is to make such order as would be proper in a proceeding after such rate had become effective. If the new rate seeks to increase the existing rate the burden of proof is upon the carrier to show that the increased rate is just and reasonable.

In its first report the Commission found that the proposed rates "have not been justified." (R. 12.) It treated the case as one in which the burden of proof was upon the Milwaukee. It is clear that under the statute the burden of proof to show a proposed rate is just and reasonable exists only when the new rate is a rate increased since January 1, 1910. Rates may be unlawful which are not unreasonable, *i. e.*, they might violate Section 2 by being discriminatory, or Section 3 by creating an undue prejudice against one person, firm, locality or description of traffic and an undue preference to another person, firm, locality or description of traffic. (Sections 2 and 3, Title 49 U. S. C.) The only other class of rates declared by the Act to be unlawful are those which are higher for a shorter haul included within a longer haul than the rate for the longer haul. (Section 4, Title 49, U. S. C.)

In the case of *Anchor Coal Co.* v. *United States,* 25 Fed. (2d) 462, at page 474, *et seq.,* the Court considered this question fully, and held that the burden of proof was not upon the carrier to justify a reduced rate.

In its second report no mention is made of burden of proof, but in its second order the Commission refers to the first report and makes it a part of the order, and apparently relies upon the alleged failure of the carrier to sustain the burden of proof of showing the suspended rates to be just and reasonable. In this regard the Commission erred.

The provision for a hearing in Section 15 (7) of the Act "implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." *The Chicago Junction Case,* 264 U. S. 258, 265.

If there is no evidence to show a rate is unlawful the Commission has no jurisdiction to enter an order in respect thereto. A finding without evidence is beyond the power of the Commission, and an order based thereon is contrary to law and must be set aside. The Commission can not act upon its own information, but must confine its consideration to facts appearing of record by competent evidence. *Interstate Commerce Commission* v. *L. & N. Ry. Co.,* 227 U. S. 88, 92, 93.

It is the duty of the Commission to report the facts and give the reasons on which it reaches its conclusions. The Court will set aside orders which are not supported by adequate findings of fact, which facts must be in turn supported by substantial evidence of record. A general statement in the language of the Act finding that the rate is unreasonable in violation of Section 1 (5) is not sufficient to support an order requiring the cancellation of such rate. *Florida* v. *United States,* 282 U. S. 194, 212, 213.

Where the Commission enters an order affecting a number of rates, such order must be supported by competent evidence as to each of the rates. The Commission can not predicate its order respecting the rates to Elgin and DeKalb and other of the 38 destinations involved on findings

or evidence dealing only with the rates to Rockford and Freeport, the most distant from the mines of all of the destinations involved. If the evidence regarding a number of rates is representative of all of the rates under consideration, the Commission can so state, and can then find in regard to all of the rates. *Beaumont, St. Louis & Western Ry. Co.* v. *United States,* 282 U. S. 76, 82, 83.

The foregoing decisions, we believe, state the general rules applicable to the power of the Commission in respect to entering an order in a proceeding before it. The question in this case, applying those general rules, is whether or not the findings and order of the Commission are supported by substantial evidence of record in this case, and did the Commission fail to consider relevant and material evidence in reaching its conclusion.

III.

The District Court properly concluded that the findings of the Commission are not supported by substantial evidence.

Some of the Commission's findings are contrary to the evidence, and the Commission failed to consider competent, relevant and uncontradicted evidence material to the decision of the issue before it.

The sole issue before the Commission was the lawfulness of the rates published by the Milwaukee for the transportation of coal from mines on its line in Indiana to 38 destinations on its line in Illinois. The evidence introduced by the Milwaukee and by these interveners showed the average length of haul from the mines in each the Clinton and Linton districts via the Milwaukee to ten destinations which, it was testified, were representative of all of the 38 destinations. (R. 90, 95; Exhibits 7, 8, 9, 11, 12, 13, 14; R. 149-164.) The Commission refused to consider the distance via

the Milwaukee from the mines on its line but based its conclusion on the service performed by other carriers serving mines in the same vicinity.

This hearing involved the lawfulness of the rates of the Milwaukee and not the lawfulness of the rates of any other carrier. Section 1 (5) of the Act states that all charges made for any *service* rendered in the transportation of property shall be just and reasonable and every unjust and unreasonable charge for *such service* or any part thereof is prohibited and declared to be unlawful. The rate of the Milwaukee cannot be considered apart from the service which it performs under that rate. The refusal of the Commission to consider the service performed by the Milwaukee, viz. the transportation of coal over its single line for an average distance to these destinations of 216 miles from the Clinton district and 260 from the Linton district for the charge of $1.70 and $1.75 per ton respectively, was arbitrary and a failure on the part of the Commission to consider material evidence.

The Commission's consideration dealt only with the destinations of Rockford and Freeport. However, in considering those destinations, the Commission did not consider the 231 mile haul of the Milwaukee but considered the hauls and service via four other carriers from the Brazil-Clinton group whose service ranged from a transportation of 241 miles to 332 miles over route embracing two or three lines of carriers. (Exhibit 8, R. 149.) No reason was pointed out by the Commission in its report as to why it would be unlawful for the Milwaukee to transport coal from mines on its line in the Brazil-Clinton district to Rockford for $1.70 per ton for its haul of 231 miles merely because the Pennsylvania Railroad charged a rate of $1.87 for the haul via two lines of carriers over a distance of 332 miles to reach Rockford. The legality of the rate of the Pennsylvania was not before the Commission.

The record shows that these rates were published to restore a relationship which had existed for many years between the rates from mines on the Milwaukee in the Clinton and Linton districts and the rates from the central Illinois and southern Illinois groups to these destinations. (R. 77.) The Commission refused to consider or to compare the service performed by the Milwaukee for the rate of $1.70 with the service performed by carriers in serving mines in the central Illinois and southern Illinois groups to these destinations. It condemned as not justified the $1.70 rate of the Milwaukee from the Clinton district for its haul of 231 miles to Rockford when this record shows that 13 of the 15 railroads serving mines in the central Illinois group were hauling coal from that group to Rockford for $1.70 per ton for average hauls ranging from 230 miles to 285 miles and while two of said carriers charged $1.70 for hauls of 199 miles and 201 miles respectively, via the shortest routes available from the Illinois mines. (Exhibit 9, R. 154.) The Commission failed to consider the evidence dealing with the eight representative points other than Rockford and Freeport, to which the rates suspended applied. (R. 11.) It ordered the rate of $1.70 from the Clinton district mines of the Milwaukee to DeKalb cancelled, which rate applied to a haul of 194 miles, while shippers of coal from the central Illinois group pay a rate of only $1.60 to DeKalb for an average haul of 224 miles, the shortest of such hauls being 189 miles and the longest 291 miles. (Exhibit 9, R. 157.) Under its order, it would require the Milwaukee to charge $1.85 for the haul from the Linton district mines on the Milwaukee to Bensonville, a distance of 213 miles, while it permits the shippers in southern Illinois to enjoy a rate of $1.90 for a haul of 359 miles to DeKalb and a rate of $2.00 for a haul of 366 miles to Bensonville. The Commission, in its second report, states that a rate may be unlawful because it is too low, and implies that these rates published by the Milwaukee were lower than reason-

able rates. (R. 37, 38.) In this respect the Commission has failed to consider the innumerable rates shown in this record which are substantially lower, distance considered, than the rates published by the Milwaukee. Exhibit 1 (R. 143) shows rates from Mt. Olive, Illinois, from the mines of one of the protestants, of $1.70 per ton to Rockford for hauls ranging from a minimum of 280 miles to a maximum of 341 miles, as compared with the proposed rate from the Clinton mines on the Milwaukee of $1.70 for 231 miles. The Commission failed to consider the fact that the Milwaukee was obliged to participate in rates of $1.70 per ton from the central Illinois group to Rockford for hauls ranging from a minimum of 199 miles to a maximum of 373 miles. (Exhibit 4, R. 147.)

The Commission failed to consider the comparison of direct hauls from the Illinois groups via single line carriers in comparison with the direct haul of the Milwaukee from the Clinton and Linton districts shown in Exhibit 15, Record 165, 166. For example, to Rockford the single line haul of the Milwaukee from the Clinton district is 231 miles; the suspended rate $1.70; from the central Illinois district the single line haul of carriers serving that district range from 233 miles to 275 miles, and from the southern Illinois district to Rockford for the two lines having direct routes the haul range from 365 miles to 403 miles. The rate of $1.70 for the single line haul of the Milwaukee for 231 miles is not unreasonably low in comparison with the single line hauls from central Illinois of 233, 235 and 278 miles via the carriers having direct lines from that group to Rockford shown in Exhibit 16. (R. 166.)

The Commission failed to consider the fact that the rate of $1.70 published by the Milwaukee applied to its single line haul, while the service from the other carriers serving mines in the Brazil-Clinton and Linton-Sullivan groups in

Indiana and the central Illinois group all involve two or more lines of carriers, except those shown in Exhibits 15 and 16, (R. 165, 166) and such single line hauls from central Illinois and southern Illinois are longer than the haul of the Milwaukee.

There were two sets of rates before the Commission, viz., those from the mines in the Clinton district and those from the Linton district to these destinations. The Commission did not consider any of the evidence relating to the mines from the Linton district other than to name the district and show the rates. The Commission did not consider the fact that the haul from the Linton district to Rockford via the Milwaukee of 275 miles is $1.75 in comparison with average hauls from the southern Illinois group to Rockford of 371 miles for a rate of $2.00 per ton.

The Commission states what the rates from the Brazil-Clinton and Linson-Sullivan groups would be, based on the average distance from those groups to Rockford and Freeport under the scale prescribed by the Commission in the case of *Coal Trade Association* v. *B. & O. R. R. Co.*, 190 I. C. C. 743. (R. 44-45.) It fails to apply that scale to the distance from mines on the Milwaukee in the Brazil-Clinton and Linton-Sullivan groups to Rockford and Freeport and fails to show what the rates would be from central and southern Illinois to those destinations under that scale. The evidence, however, shows that the rates from central Illinois to the 10 representative stations are on the average 82 per cent of the scale prescribed in that case and that if the rates from the Clinton group were based on the same percentage of that scale as the central Illinois rates are of that scale, the rates of the Milwaukee to the average of the 10 stations would be $1.56 in lieu of the $1.70 published by the Milwaukee and suspended by the Commission. The evidence further shows that applying

the central Illinois per cent of rates based on that scale to each of the 10 destinations for the mileage via the Milwaukee the resulting rates would range from $1.43 at Bensonville to a maximum of $1.70 at Freeport, and from the Linton field would range from a minimum of $1.62 at Bensonville to a maximum of $1.83 at Freeport, and on the average would be $1.70. (Ex. 14, R. 164.)

The Commission in its report speaks of disrupting a rate relationship between the Indiana groups as among themselves, and the relationship as between Indiana and Illinois. The Commission has given no consideration to the evidence showing the prevailing relationships in rates to stations in southern Wisconsin as between mines in the southern Illinois and central Illinois groups and the Brazil-Clinton and Linton-Sullivan groups. Exhibits Nos. 22, 23, 24, 25 and 26 show the general differentials applying into Wisconsin. (R. 173, 182.) These exhibits show that as between Brazil-Clinton and southern Illinois group to the seven destinations in southern Wisconsin the average difference in distance is 127 miles, and the average difference in rates is 32 cents as between all the mines in the Brazil-Clinton group and all the mines in the southern Illinois group, and that as between central Illinois and Brazil-Clinton the average difference in distance is 8 miles in favor of Brazil-Clinton, and the average difference in rates is 2 cents in favor of Brazil-Clinton. (R. 99-102.)

To the average of the 10 representative stations shown in this case, the difference between the Milwaukee mileage and that of southern Illinois is 157 miles. Under the suspended rates the difference, the Milwaukee, Brazil-Clinton rates under southern Illinois, would be 30 cents per ton, and as compared to all the mines in the Brazil-Clinton district the difference under southern Illinois would be 116 miles. (Exhibits 13 and 18, R. 163, 168.) Other pertinent

evidence was introduced in regard to the general relationship, but was not considered by the Commission. (See R. 99-102, and the exhibits there referred to.)

The Commission finds that the rate of the Milwaukee will split or disrupt the Brazil-Clinton and Linton-Sullivan groups. The Commission failed to consider the fact that from the Brazil-Clinton group to 3 of the 10 representative stations the carriers published different rates and that from the Linton-Sullivan group to 5 of the 10 representative stations the carriers publish different rates. In other words, the Commission failed to consider the fact that the mines in these so-called groups do not universally take the same rate to common destinations. (See Exhibits 8 and 9, R. 149, 158.)

The Commission in its report states that the evidence shows there has been no greater decline in traffic from Brazil-Clinton and Linton-Sullivan to Rockford since the rate was reduced than suffered by southern Illinois. (R. 9 and 38.) In making this statement the Commission failed to consider the evidence that in 1932 all of the mines in Illinois were closed down by reason of a strike for 5 months (R. 113), while mines in all the Indiana groups were operating during that time. The Commission also failed to consider the fact that the Indiana producers in the Brazil-Clinton and Linton-Sullivan groups had to materially reduce their f. o. b. mine prices in order to sell their coal at Rockford and that they could not continue to do so indefinitely; that it was done to hold business pending an adjustment of the relationship of the rates. (R. 139, 140.)

The Commission failed to consider evidence that the 10 destinations shown in the various exhibits introduced by these interveners was representative of each of the 38 destinations to which each of the suspended rates applied.

The Commission made statements which are not sup-

ported by evidence in this case and predicated its conclusions upon such statements of alleged fact.

The Commission states "the immediate effect of the Milwaukee's proposal would be to split those groups with lower rates from mines on that line than from mines on competing lines in the same group." This statement is true as to some of the stations, but is not true as to others, as shown by Exhibits 8 and 9. The report states repeatedly that the Milwaukee proposed to reduce the rates from the Brazil-Clinton and Linton-Sullivan groups 17 cents per ton. The evidence shows clearly that the Milwaukee's proposal applied only from the mines on its line.

In the second report of the Commission it is stated that the rates from the various origin groups in Illinois are definitely related to each other and that they are generally in conformity with the findings in the *Illinois Coal Cases*, 1920. There is no evidence of record to sustain that statement.

In its second report the Commission states what purports to be allegations in a complaint filed with it respecting the reduction of rates in Illinois in the *13th Section Case*, 182 I. C. C. 537. (R. 37.) There is no evidence in this record as to what the allegations were in that complaint or what evidence was introduced in that case other than the evidence introduced in this record showing that certain statements made by the Commission in its report in the 13th Section Case, *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537, were erroneous. This evidence appears at pages 96 to 99, inclusive, of the record in this case.

The Commission in its report states that the Milwaukee introduced evidence in the *13th Section Case* to the effect that the Illinois rates were too low. (R. 37.) There is no evidence in this record that the Milwaukee introduced any

evidence in the *13th Section Case,* or to show that any carrier testified that the Illinois rates were too low.

The Commission states that the increase of tonnage of coal from the Springfield group to Rockford resulted from the distribution of coal for relief purposes at Rockford. (R. 38.) The evidence, however, shows that there was a substantial increase in the shipment of coal from the Springfield, or the central Illinois group, to Rockford in 1931 and 1932 over 1929, but does not show that it was because Springfield coal had to be used for relief purposes. The evidence was that cheap coal was used for relief purposes, and that Springfield coal was a cheap coal and was used for relief purposes. The evidence did not show the mine price of the Springfield coal in comparison with the mine price of Clinton, Indiana coal. There is nothing in the record to support the Commission's statement that the rate had nothing to do with the increase in the shipments from the central Illinois group. In this connection it might be pointed out that the record shows that the southern Illinois operators were selling their coal uniformly at a price of $2.25 per ton f. o. b. mines, while coal from the Brazil-Clinton and Linton-Sullivan districts of the same size was being sold as low as $1.40 per ton f. o. b. mines. (R. 111.)

The Commission finds that the result of the Milwaukee rates will be to split the Brazil-Clinton group and the Linton-Sullivan group, and will disrupt the long existing differential relationship between the Indiana groups. (R. 40.) The record is silent as to what the relationship is as between those groups as to 36 of the 38 destinations involved. The record shows that from the Princeton group to Rockford two rates are in effect via different carriers serving that group. (R. 76.) The Commission makes the above findings without any evidence to support them. The state-

ments in the record in regard to the usual differentials do not afford a basis for a finding of fact that such differentials prevail at any specific point.

There is no evidence and no finding that the groupings as they now exist are just and reasonable. There was no evidence and no findng that the so-called differential relationship between the groups is just and reasonable. Those questions were not in issue in this case. The record shows that the question of relationship as between the various Indiana groups on the one hand and the southern Illinois group on the other was pending before the Commission in regard to rates to Wisconsin, Iowa and Minnesota. (R. 102.) The Commission, in the absence of any evidence that the present groups, which it assumes to exist, are reasonable, finds that it would be unlawful for the Milwaukee to publish a rate lower than other carriers serving such groups.

In this connection we desire to point out that the affirmative evidence shows that the grouping that exists is purely the result of voluntary action on the part of the carriers serving mines in a given vicinity; that so far as the Indiana groups are concerned, some carriers meet a competitive rate to one destination, and not to another. (Exs. 8 and 9, R. 149 *et seq.*)

The evidence shows that the publication by the Milwaukee of a lower rate to these destinations is not unfair to the other carriers serving mines in the same groups. It cannot be said to be unfair to the Pennsylvania Railroad for the Milwaukee to publish a rate of $1.70 for its 231-mile haul from Clinton district to Rockford, when the Pennsylvania charges $1.87 for its 332-mile haul from its Brazil-Clinton mines to Rockford. It is no undue hardship on the Monon Railroad for the Milwaukee to publish a rate of $1.75 per ton from Linton district mines to DeKalb, a distance of 238

miles, as compared with the Monon's rate of $1.79 for 292 miles to DeKalb, or the rate of the Illinois Central of $1.79 for its haul of 323 miles to DeKalb. (Ex. 8, R. 154.)

Where carriers serving Brazil-Clinton publish the same rates as formerly published by the Milwaukee, the average distance of the hauls to the 10 destinations shown in Exhibit 8 (R. 149) is 256.3 miles. (See Table I *supra.*) This is 40 miles more than the average haul via the Milwaukee. The difference in the average rates of those other carriers to the 10 stations and the suspended rate of the Milwaukee is 10.8 cents per ton. On the average, the service is more than 18 per cent greater than the Milwaukee service, because the distance is 18 per cent greater plus the two and three-line hauls via the other carriers. The average rates of the other carriers are only 6 per cent greater than the suspended rates of the Milwaukee.

It is manifest that when the Commission states that the suspended rates will disrupt the Brazil-Clinton group it gave no consideration to these facts. Its report shows that those facts were not considered.

From the Linton-Sullivan group, common rates were published by all six carriers to five of the 10 representative points—while to the other five points one to four of the six carriers publish rates that are different than the old rate of the Milwaukee. Where other carriers published the same rates as the former Milwaukee rates, the average distance via their routes to these ten stations is 286.3 miles, while via the Milwaukee the average distance is 260 miles. The distance via the other carriers is 10 per cent greater than via the Milwaukee, the suspended rate of the Milwaukee is only 5.8 per cent less than the average rates of the other carriers.

These facts cannot have received consideration by the Commission in reaching its conclusion that the suspended

rates would unlawfully disrupt the Brazil-Clinton and Linton-Sullivan groups.

The Commission throughout its reports states and reiterates that the rates in this Indiana-Illinois territory are low rates. There is no evidence in the record to support that statement. One witness testified that all of the rates in this territory were less than reasonable maximum rates but that is not evidence that they are unduly low. Statements made by the Commission in other cases are not evidence in this case, and under the rule laid down by this Court, cannot be considered by the Commission in deciding this case. The Commission cannot go to general statements made in its decisions in other cases to sustain its order in this case. *Interstate Commerce Commission* v. *L. & N. Ry. Co.*, 227 U. S. 88, 92-93.

The Commission says: "* * * the proposed rates, compared with rates recently prescribed for like distances in this general territory, would be unreasonably low." (R. 45.) This statement is contained in a paragraph comparing the $1.70 and $1.75 rates published by the Milwaukee with the rates that would result under a scale of rates prescribed as reasonable maximum rates from Indiana mines to destinations in the central eastern portion of Illinois (Docket 23922, *Coal Trade Association* v. *B. & O. R. R. Co.*, 190 I. C. C. 743), to the average distance via all carriers serving mines in the Brazil-Clinton and Linton-Sullivan groups to Rockford and Freeport. The Commission did not apply that scale to the distances via the Milwaukee. The Commission failed to consider the rates from the southern Illinois group to Rockford and Freeport or from the central Illinois group in comparison with that scale, although such comparisons were in evidence (Exs. 13, 14, 18, R. 163, 164, 168) in respect to each of the ten representative stations shown in evidence.

The Commission goes outside of the record to compute a possible loss of revenue to carriers which would follow a reduction of 12 cents per ton in the rates to Chicago. (R. 43.)

The Commission in its second report quotes from testimony of witness DeCamp (R. 127 and 129) to support its first report that dire consequences would follow if the suspended rates of the Milwaukee became effective. Mr. DeCamp prefaced his statement by referring to Exhibit 40 (R. 215), saying: "Now, the second column I want to direct particular attention to. That visualizes what the future *may hold and what we fear.*" (R. 129.) He further said: "I show them as standard rates in this exhibit *because I firmly believe* that if these reductions are confirmed and approved by the Commission, the ink will not be dry upon the order vacating the suspension before tariffs of competing lines in the same districts will be issued making the same reductions."

Again this witness said: "Why, it will only be a matter of time, *as I see it,* in such event before the Princeton and Boonville groups will follow with similar reductions." Again he said: "Now, *if it should happen, which in all probability may be,* all of Indiana goes down 17 cents, how long would it be before drastic requests and strong pressure would be exerted upon Illinois roads to make a similar reduction? *Now, if that were done, which is possible,* it would produce lower rates to Freeport and Rockford from the large originating groups in Illinois than apply to Chicago. For illustration, southern Illinois to Rockford and Freeport is $2.00. A 17-cent reduction would make $1.83 versus the Chicago rate of $1.95. There are routes from southern Illinois to Rockford and Freeport which apply via Chicago." (R. 129).

That is all that is in this record on the subject that other rates from Indiana would be reduced, or that Illinois rates would be reduced, or that rates to Chicago would be reduced. It is not evidence of any fact. It is a statement of what the witness feared might possibly happen. It is not substantial evidence. Yet on the basis of those loose general statements, plus data not of record in this case, the Commission states that if the Chicago rates were reduced the carriers would lose $1,400,000 a year in revenue. (R. 43.) On the basis of those statements the Commission finds that the suspended rates would disrupt the rate structure on coal in Indiana and related areas, thus impairing the revenues of the carriers serving those areas, and their ability to provide adequate and efficient transportation. (R. 46, 47).

The fears of this witness or the belief of this witness do not constitute evidence of facts upon which the Commission can predicate a finding that these rates are unlawful. Nowhere does this witness state that the Illinois Central Railroad, the only carrier for which he appeared, would reduce its rates from the Linton-Sullivan group. He did not state that any responsible officer of any carrier had said that the rates of such carrier would be reduced.

It is clear that these statements of witness DeCamp were pure speculation and surmise. The general rule in regard to such evidence is stated in 22 Corpus Juris, page 640, paragraph 735, as follows:

> "*Conjecture Excluded.* While absolute certainty is not required of an expert, his judgment must involve the element of such mental certainty on the part of the witness as will render it of real aid to the jury. Accordingly, no matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture. * * *"

In the case of *Kimbrough* v. *Chicago City Railway*, 272 Ill. 71, 75, *et seq.*, the court said:

> "It is clear that the evidence thus elicited and objected to by plaintiff in error is purely speculative evidence,—that is, the conjecture of the witness as to consequences that are mere possibilities,—and was therefore incompetent. * * * Mere surmise or conjecture cannot be regarded as proof of an existing fact or of a future condition that will result. Expert witnesses can only testify or give their opinion as to future consequences that are shown to be reasonably certain to follow."

In the case of *Lyons* v. *Chicago City R. Co.*, 258 Ill. 75, 81, it is said:

> "While it is often difficult to draw the line between legitimate inference and bare conjecture, only such inferences may be drawn as are rational and natural. Mere surmise or conjecture is never regarded as proof of a fact and the jury will not be allowed to base a verdict thereon."

In *Kern* v. *Snider*, 145 Fed. 327, 329, the court said:

> "Mere conjecture will not sustain verdicts. They must be founded on evidence which convinces the mind. They can not rest on mere guess or speculation. * * * Verdicts can be based only on reasonable probabilities. Mere possibilities can not establish probability. * * * There must be sufficient evidence to remove the question from the realm of mere conjecture."

It is clear from the statements in the above cases that the surmise and guess of witness DeCamp as to what might happen, or the possibility of the Illinois rates being reduced were so remote from any facts shown in the case or stated by the witness that they amount to pure conjecture and surmise, and in a law court would have been excluded as incompetent.

There was not one word in the evidence that if reductions were made in the Illinois and Indiana, the revenues of the carriers serving Illinois and Indiana would be impaired. Such reductions might increase their revenues by

inducing a substantially greater movement of Illinois and Indiana coal. As this Court said in *Florida* v. *United States,* 282 U. S. 194, 214:

> "The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage."

There is no evidence that the reduced rates of the Milwaukee will impair the revenues of it or other carriers, or impair the ability of the Milwaukee or such other carriers to provide adequate and efficient transportation. The Commission in its brief in this case does not attempt to point out any evidence to support this finding.

The statement by the Commission that the suspended rates would be lower than rates in Illinois which it had stated were below the reasonable level of rates is not correct. The suspended rate of $1.70 is not lower than any of the Illinois rates to these destinations. As applied to the Milwaukee, and they are only applicable via the Milwaukee, those rates are higher mile for mile than the average of the rates from the central Illinois group to any of the destinations. (Exs. 8 and 9, R. 149 et seq., Tables I and II, *supra.*)

The failure of the Commission to consider competent, material and unquestioned evidence, and its statements and findings which are not supported by evidence of record we submit required the Court to set aside the order of the Commission in this case.

IV.

The Commission has no power to adjust rates so as to destroy one district or to build up another.

In the case of *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, it is said:

> "While carriers may meet competition by equalizing rates, or maintaining differentials * * * they may

> not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality * * *. A tariff published for the purpose of destroying a market or building up one, or for diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously what the carrier may not lawfully do, the Commission may not compel."

Applying that doctrine to this case, the Commission may not compel the Milwaukee to continue to publish rates on a higher level than the rates from competing coal fields and so prevent shippers on the line of the Milwaukee from selling their coal at these 38 destinations and permit Illinois producers to monopolize those markets.

The Commission may not compel the Milwaukee to charge $1.87 per ton for its average haul of 231 miles to Rockford, because the Pennsylvania Railroad charges that rate from mines in the same vicinity for its 332-mile haul.

The Commission may not compel the Milwaukee to charge $1.87 rate to Freeport from Brazil-Clinton in order that central Illinois mines can market their coal there, on a rate of $1.70 for an average haul of 261 miles. To Elgin the Commission cannot compel the Milwaukee to maintain a rate of $1.80 for its haul of 188 miles while central Illinois enjoys a rate of $1.70 for an average haul of 249 miles or southern Illinois a rate of $2.00 for an average haul of 377 miles. (Exs. 8 and 9, R. 149 et seq.)

The effect of the order of the Commission would be to bring about the destruction of the market for coal from the mines of these interveners at these destinations, and hand those markets to central and southern Illinois. This is the very thing which the language of this Court, above quoted, condemns.

V.

Section 15 a (2) of the Act does not empower the Commission to order the cancellation of a suspended rate which does not violate some other provision of the Act.

As we have heretofore shown, Section 15 a (2) of the Act (Title 49, U. S. C.), does not declare any rate to be unlawful. It is a direction to the Commission to consider certain factors in prescribing just and reasonable rates. The first factor to be considered is "the effect of rates on the movement of traffic."

The evidence in this case is that the Indiana operators could not continue to reduce their prices to these markets so as to absorb the rate differences brought about by the reductions in the Illinois rates. (R. 139, 140.) These suspended rates are necessary if the Milwaukee is to continue to move this traffic. The Commission has ignored this factor as applicable to the Milwaukee.

The second factor is: "the need, in the public interest, of adequate and efficient railway transportation at the lowest cost consistent with the furnishing of such service." These interveners have an interest in the Milwaukee being in a position to furnish adequate service. The public at these destinations have an interest in having these rates effective. If these interveners cannot ship coal to these destinations, and the Milwaukee is deprived of the revenue it could secure for its single line haul to these destinations, it may seriously handicap that road in furnishing service to other destinations. But this second factor surely means that the carrier should furnish adequate service at the lowest possible cost to all destinations served by such carrier. If these interveners are subjected to rates under which they can not ship to these 38 destinations; if the

rates are higher relatively than other rates to the same destinations they are not being furnished service at the lowest possible cost, because so far as this record shows, the other carriers are furnishing adequate service under lower rates. There is no evidence in this record that the suspended rates are not consistent with the Milwaukee furnishing adequate service.

The third factor is "the need of revenues sufficient to enable the carriers * * * to provide such service." Again this must be read as applying to the carrier or carriers whose rates are to be prescribed. There is no evidence that the suspended rates will not provide the Milwaukee with sufficient revenue to provide the service to these destinations.

The change made in Section 15 a (2) by the Emergency Transportation Act of 1933 is important. Under that section in the 1920 Act the Commission was directed to fix the measure of rates so that the carriers as a whole or as a whole in such rate groups as the Commission might establish could earn a net income which would be a fair return upon the property value of such carriers.

The former Section 15 a (2) was part of the recapture of earnings plan which dealt with the carriers as a whole. The carriers were to receive a fair return upon the value of their property devoted to transportation service, and the Act imposed a duty upon the Commission to fix rates to accomplish that purpose.

The present provision is merely a direction to the Commission to consider certain factors in prescribing rates. No longer is there a basis for taking from one carrier to give to another in order that the carriers as a whole may earn a certain return upon their investments.

The Milwaukee has the right to exercise its managerial

judgment in the publication of rates necessary to retain traffic, so long as those rates do not violate some positive inhibition of the Act. The Commission can not cancel such rates under any theory that they would prevent other carriers earning a sufficient revenue. The evidence in this case shows that the Milwaukee has in the past transported over 95 per cent of the coal from Brazil-Clinton and Linton-Sullivan groups to these destinations, so it is clear that the other carriers serving those groups would not be materially affected by the reduced rates of the Milwaukee. In fact, such other carriers would not be affected at all. It is evident that no coal will move from those groups under a permanent arrangement of rates, central Illinois from 14 to 17 cents per ton less than Brazil-Clinton, and southern Illinois only 13 to 20 cents per ton higher than Brazil-Clinton. Other carriers serving Brazil-Clinton and Linton-Sullivan groups will not be any more deprived of revenue by the Milwaukee hauling coal from its mines in those groups than by the carriers serving the Illinois groups hauling Illinois coal to these destinations.

The statement of this Court in the case of *Florida* v. *United States*, 292 U. S. 1, 7, that the changes in Section 15 a (2) did not show an intention to relax the control of the Commission over intrastate rates, does not hold that the Commission can prescribe rates for one carrier in order that other carriers can maintain or increase their revenues.

The report of the House Committee appearing in the footnote on page 7 of that decision shows that in following the directions in Section 15 a (2) the Commission can only give consideration to facts of record, and that Congress assumed that the Commission would develop sufficient facts on the record in regard to the factors specified so as to be in a position to act.

It is manifest that the record in this case is devoid of any evidence upon which the Commission could predicate a finding that the rates of the Milwaukee would detrimentally affect any of the factors mentioned in Section 15 a (2).

VI.

Analysis of argument for appellants.

The brief for the Railroad appellants argues that the Commission ordered the rates of the Milwaukee cancelled because they were less than reasonable minimum rates. It is stated, page 23:

> "There was no contention that the proposed rates of the Milwaukee were so low that they would not yield sufficient revenue to compensate it for its services in rendering transportation thereunder. * * * One of the principal issues of law, therefore, is whether proposed reduced rates which would precipitate a general reduction in a rate structure not unreasonably high, and result in the unnecessary dissipation of the carriers' revenues and impairment of their ability to render adequate and efficient transportation service are unlawful and can be prohibited by the Commission."

This statement admits that there was no evidence that the rates of the Milwaukee in and of themselves were less than reasonable minimum rates.

In the case of *Texas & Pacific Railway Company* v. *United States*, 289 U. S. 627, this Court made the following statement in respect to minimum rates:

> "The evidence fails to show that the rates of the Texas & Pacific and the L. R. & N. on export shipments to and from New Orleans were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic. There was therefore no basis for an order fixing minimum reasonable rates under Section 15 (1) of the Act."

It is stated by the Railroad appellants that there was no evidence in this case that the rates of the Milwaukee were not compensatory. There was no evidence in this record that the rates were so low as to cast a burden on other traffic of the Milwaukee. In fact the evidence is that the maintenance of the higher rates would deprive the Milwaukee of revenue from the transportation of coal from mines on its line in Indiana to these destinations and the inference is that being deprived of such revenue a burden would be cast upon its other traffic.

The Commission attempts to work out in its second report a complicated series of possible results in order to justify its order requiring the cancellation of these rates. Briefly what the Commission has evolved is as follows: Other carriers serving mines in the same groups *might* reduce their rates; *if* other carriers in the same groups reduce their rates, carriers serving the more southerly groups in Indiana *might* reduce their rates; *if* the carriers serving the more southerly groups in Indiana reduce their rates the shippers of coal in Illinois *might* seek reductions in the rates from the Illinois groups to these destinations; *if* the Illinois shippers were able to persuade or force the Illinois carriers to reduce their rates to these destinations the resulting rates *might* be less than the rate to Chicago; *if* the resulting rates to these destinations were less than the rates to Chicago the rates to Chicago *might* be reduced; *if* all of these things occurred, the revenues of the carriers serving Illinois would be materially reduced.

On the basis of these remote possibilities the Commission states that the revenues of the carriers would be dissipated and their ability to render adequate and efficient transportation service impaired. Appellants follow this same line of reasoning in stating the principal issue of law above quoted. They omit to consider, however, that if all

the dire consequences which they have conjured up occurred, still this record is void of any evidence that these possible reductions would impair the revenue of the carriers serving Illinois or would impair their ability to render adequate and efficient transportation service. It is quite possible that with lower rates in this territory these carriers would transport more coal and thus increase their revenues.

We do not question the power of the Commission in proper cases and upon proper evidence to exercise the minimum rate-making power conferred on it by the Act, but that power can only be exercised when the facts appearing of record in a given case warrant it. A study of the decisions of the Commission and of this Court show that the minimum rate power has been exercised in removing discrimination resulting from undue preference to one locality or shipper and undue preference to another.

It is not claimed by appellants that the rates of the Milwaukee unduly preferred any person, locality or description of traffic or unduly discriminate against anyone. As stated in the case of *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, 647, *et seq.*, dealing with discrimination:

> "The reason for the doctrine is that preference or prejudice can be found only by the comparison of two rates. If these are the rates of one carrier to point A and that of another to point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate because the other carrier's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under section 3 an alternative

must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both."

It is clear that the Milwaukee does not discriminate in its rates under the definition of discrimination above given. In the intra-state cases which have been passed upon by this Court, the minimum rate-making power has been exercised to prevent a discrimination in intra-state rates against inter-state rates. In the case at bar there is no question of discrimination involved.

Appellants cite the decision in *Jefferson Island Salt Mining Co.* v. *United States,* 6 Fed. (2d) 315, 319, where it is stated:

> "It was not necessary that the Commission should first have found the Detroit to Chicago rate or the Louisiana to Chicago rate was non-compensatory in order that a higher minimum rate might be prescribed, if in fact, as the Commission was justified in finding, proper rate relationships between different carriers and localities could not otherwise be established or ruinous rate wars threatening the ability of the Commission to fix rates as a whole or in groups, which would permit the earnings prescribed in Section 15 (a) could not otherwise be avoided."

If the Commission may fix minimum rates to maintain or create proper relationships between competitive carriers, where there is no discrimination, then the rule enunciated by this Court in *Texas & Pacific Railway Company* v. *United States,* 289 U. S. 627, above quoted, must be changed for, whether the carrier participated in the discrimination or not, the Commission could adjust rates for the carrier serving point A and the carrier serving point B under its assumed power to fix proper rate relationships between different carriers and localities. We submit that this is not a power accorded to the Commission under the Act.

The case of *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, did not challenge the minimum rate power. In that case the only thing before the Court was the order of the Commission. The evidence before the Commission was not introduced in the suit in the District Court. The decision in this Court was that the order of the Commission could not be assailed in the absence of the record before the Commission to show whether the evidence therein supported the order. It is significant in that case, however, that the Commission suspended the rate and in the exercise of the minimum rate power fixed a minimum rate different from that published by the carriers. In the case at bar, the Commission did not exercise its power to establish a minimum rate; it merely ordered the Milwaukee to cancel its rate which had been suspended. In the case, *United States* v. *Illinois Central Railroad Co.,* 263 U. S. 515, cited by Railroad appellants, the Illinois Central Railroad participated in the discrimination because it participated in the transportation from both sets of origin points. That case is far from holding that the Commission may refuse to permit the publication of a rate that is not unreasonably low in order that competing carriers may continue to enjoy traffic on a lower basis than the published rate of some other carrier.

At page 35, *et seq.,* of the Railroad appellants' brief, reference is made to other cases before the Commission in which references to the Illinois-Indiana rates are made. These cases are referred to to show that the Commission was informed as to the rate adjustment in this territory, and, the inference is, acted upon information acquired from its decision in those other cases.

This Court stated the law in this respect in its decision in *Interstate Commerce Commission* v. *L. & N. Ry. Co.,* 227 U. S. 88, 93:

"In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully appraised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its right or make its defense. In no other way can it test the sufficiency of the facts to support the findings; for otherwise even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support its findings. *U. S.* v. *B. & O. S. W. R. R. Co.*, 226 U. S. 14."

Applying that rule to this case, the Commission cannot supply the deficiency in the evidence in this record by considering "extraneous, unknown, but presumptively sufficient information to support its findings."

We have discussed the finding that the proposed rates would split the origin groups and have shown that to many of these destinations different rates are published from mines in the same group, at the present time. It is manifest that if different rates are published from the same group there is not a fixed relationship between the rates from some other group because there is no standard on which such differential could be predicated. For example, the rates of the C. & E. I. and Big Four railroads to Forreston, Illinois, are $1.85 per ton from the Linton-Sullivan groups; via the Monon, Illinois Central and Pennsylvania the rates are $1.92 per ton. The Commission says that the rates from Princeton are 7c higher than the rates from Linton-Sullivan. It is impossible to state whether the rate from Princeton to Forreston, therefore, would be $1.92 or $1.99 per ton. The same situation applies to other of these groups, as shown in Exhibits 8 and 9 (R. 149 *et seq.*)

and is clearly demonstrated in Tables I and II, *supra*. The evidence of witness DeCamp, as we have pointed out above, is wholly the fears of the witness as to what might possibly happen; it is not that substantial evidence which this Court has held is necessary to support a finding of the Commission. The District Court used the expression that it was not entitled to much weight; in other words that it was not substantial evidence upon which to predicate a finding.

The statements in the briefs and in the report of the Commission in regard to disrupting rate relationships entirely ignores the fact that the relationships were disrupted by the reduction in the Illinois rates, and that the suspended rates of the Milwaukee restored, so far as that line was concerned, the relationships which had existed for many years prior to August, 1930. It is not a case of disrupting relationships, but of restoring relationships which had existed for many years. The statements made at pages 43 and 44 of Railroad appellants' brief regarding the proceedings before the Illinois Commerce Commission and subsequent proceedings before the Interstate Commerce Commission are not of record in this proceeding. The only evidence in regard to the so-called *13th Section Case*, 182 I. C. C. 537, is that the statement by the Commission in that report to the effect that the rates from Indiana were lower than the rates from Illinois was predicated upon an error in comparatives. The Commission, in its decision in this case, corrects the comparisons, but does not correct the erroneous conclusion it reached and reiterates that erroneous conclusion as a grounds for sustaining its order in this case.

The fact that the Illinois operators intervened in the proceeding before the Commission in an attempt to

retain the benefit of the lower Illinois rates as against these interveners, does not support the finding that the Illinois rates will be reduced upon the suspended rate becoming effective. At pages 45 and 46 of Railroad appellants' brief the appearance of parties is treated as evidence that a reduction in Illinois will follow the Milwaukee's rates becoming effective.

There is no foundation for the assumption that the Milwaukee rates of $1.70, which were suspended, for hauls from the Brazil-Clinton group to these destinations, ranging from 169 miles to 260 miles, would force reductions in the rate of $1.70 from central Illinois to Rockford, for example, for hauls ranging from 199 miles to 298 miles. No evidence is presented as to why the rate of the Milwaukee of $1.70 for its 194-miles haul to DeKalb would force a reduction in the present rate of $1.60 to DeKalb from the central Illinois group, where the hauls range from 189 miles to 291 miles. The possibility that such reductions would occur in Illinois is too remote to merit any consideration.

There is nothing in evidence to warrant the discussion of the possible loss of revenues to the Illinois carriers by reason of the remote possibility of rates to Chicago being reduced.

The findings of the District Court in this case were based upon a study of the record. The statements of the Court in respect to the testimony of witness DeCamp is in accordance with the law that an expert witness must testify to opinions founded upon facts or scientific observations and not upon his fears or beliefs. If such statements as those of Mr. DeCamp are to be accepted by the Commission, all that would be necessary in any case to block a reduction in rates is for some witness to testify that he feared it would bring about a rate war or if the reduced rate became

effective he believed other carriers would reduce their rates. As we have above pointed out, Mr. DeCamp did not testify that the railroad he represented, the Illinois Central, had determined to reduce its rate from the Linton-Sullivan group in the event the Milwaukee rates became effective.

The argument in railroad appellant's brief in regard to the disruption of groups and the loss of revenues to carriers is, we submit, fully answered in what we have said, *supra*, on this subject. Statements like that of the witness Malum (R. 127) that he did not think there was any question but that the reduction would spread to other railroads serving the Indiana groups is not competent evidence of a fact. Mr. Malum did not qualify as an expert so as to give any weight to his expression of opinion. The statement by Mr. Waffle that he believed that the other Indiana groups were entitled to like reductions is not evidence that there will be such reductions from such other groups.

In regard to the loss of traffic we have heretofore shown that the Commission ignored evidence that in 1932 the Illinois mines were closed down for five months by reason of a strike, while many of the Indiana mines were operating and, further, that the Commission ignored the evidence that these interveners reduced their prices in order to continue to supply coal at Rockford, and that they could not continue such reduction in price if the rate adjustment was to be permanent on the basis in which it was left by the Commission after its decision in *Intrastate Rates in Illinois*, 182 I. C. C. 537.

The District Court did not substitute its judgment for the judgment of the Commission. It merely held that the statements made by witness DeCamp, upon which the Commission predicated its findings, were not competent evidence to support those facts. As was said by this Court in the

case of *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 92:

> "The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order * * *. The legal effect of evidence is a question of law."

The legal effect of the statements of witness DeCamp was a question of law properly passed upon by the District Court, and it properly held that such statements did not constitute substantial evidence upon which to predicate a finding by the Commission.

Appellants argue that the District Court was in error in disregarding the highly competitive nature of the rate adjustment involved and its history. As pointed out, the Commission went to sources outside of this record in a large measure for developing the theory of the highly competitive rate adjustment in this territory. This record does not contain evidence upon which to base such a finding in that regard.

The only evidence of the rate adjustment in this record is that to these northern Illinois destinations the rates from central Illinois group and from the Brazil-Clinton group had for years been the same, and from both of those groups had been 30 cents per ton less than from southern Illinois. The evidence showed that to destinations in southern Wisconsin, the difference in rates was, central Illinois, 30 cents per ton under southern Illinois, and Brazil-Clinton to some of those stations the same as central Illinois and to stations in southeastern Wisconsin 5 cents per ton less than from central Illinois. The evidence further showed that the differences in distances as between Brazil-Clinton, central Illinois and southern Illinois to these Wisconsin destinations was practically the same as to the destinations

here involved. (R. 99-101, Exs. 22, 23, 24, 25 and 26; R. 173-182.)

Appellants criticize the statement in the opinion of the District Court to the effect that it is unquestioned but that the Milwaukee is in a position to serve the mines in the Brazil-Clinton and Linton-Sullivan groups which are on its lines at a much cheaper rate than other carriers whose lines touch coal mines in the same vicinity, and more cheaply than lines in Illinois can serve the southern Illinois and the Springfield groups to Rockford and Freeport. Appellants say there was no evidence with respect to the cost to the Milwaukee or other carriers in handling coal; that it did appear that the Milwaukee had a single route from its mines and that the distances from those mines are shorter than the distances from other mines, but these are by no means the only elements in the cost of transportation.

In this record the measure of distance and the fact that the Milwaukee had a single line haul while the other carriers serving the Brazil-Clinton and Linton-Sullivan groups had a two or more line haul was the only evidence regarding transportation conditions offered. In view of this evidence the District Court was fully justified in stating a fact that from the evidence was obvious. It is true that the Commission wholly ignored the service of the Milwaukee in connection with the rates which it published, a fact which in and of itself is sufficient to cause the court to set aside the order of the Commission requiring the cancellation of the Milwaukee's rates.

Appellants argue that the fact that the Milwaukee might serve the mines on its lines to these destinations at a cheaper rate than other carriers in the group could serve mines on their lines to the same destinations is immaterial. They argue that the question does not depend upon the in-

trinsic reasonableness of the Milwaukee's rates, but whether the publication of such rates would have a tendency to cause other carriers to reduce their rates, citing a decision of the Commission, *In re Lake Iron Ore from Chicago to Granite City*, 123 I. C. C. 503, 504, to the effect that the Commission had authority to condemn a proposed rate if the evidence warrants the conclusion that such rate would tend to precipitate changes in a rate structure or in traffic which will be harmful in the public interest under Section 15 a of the Act as amended in 1920.

Whatever the responsibility of the Commission may have been under Section 15 a of the Act as amended in 1920, it does not have that same responsibility today. The fact that the Commission may have misconceived its authority does not affect the law. As was said in the case of *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627:

> "Where a statutory body has assumed a power plainly not granted, no amount of such interpretation is binding upon the courts. *Interstate Commerce Commission* v. *C. N. O. & T. P. Ry. Co.*, 167 U. S. 479, 510."

Appellants criticize the statement of the District Court that there was no evidence in the record that the present rate structure is fair, or that it is reasonable; no evidence that its dissolution would necessarily lead to the introduction of unfair or unreasonable rates. Appellants do not in that connection point to any evidence in regard to the fairness of the rate structure, or that the rate structure is reasonable, or that its dissolution would lead to the introduction of unfair or unreasonable rates. Appellants content themselves with saying that the Milwaukee conceded that the rates were less than reasonable maximum rates. The District Court properly stated that if some other carrier undertook to publish a rate that was unlawfully low, the Commission could act in respect to such rate, but that

it cannot prohibit the Milwaukee from publishing a rate that is not less than a reasonable minimum rate merely because some other carrier might later do so.

The District Court properly found that the order of the Commission was unfair and discriminated against the Milwaukee, and it also discriminated against these interveners. No greater discrimination can be conceived of than where a carrier is compelled to maintain rates under which traffic will not move in order that competitive carriers may transport traffic from competitive points to a given destination at relatively lower rates. No greater discrimination can be created than an order of the Commission requiring a carrier to maintain higher rates for a lesser service than is enjoyed by competitors when such rates are so high as to prevent the shipment of freight. An examination of the various exhibits and evidence in this case shows that the Commission would have compelled the Milwaukee to publish rates averaging $1.808 to these destinations for hauls from its Clinton district averaging 216 miles, while carriers serving the central Illinois group publish rates which average $1.69 per ton for hauls which average 252 miles. That is a gross discrimination. To compel the Milwaukee to publish rates to these destinations which average $1.858 per ton from its Linton district for average hauls of 260 miles, while the carriers serving southern Illinois maintain rates that average $1.99 per ton for hauls that average 373 miles to these destinations is a discrimination, and is unfair both to the Milwaukee and to these interveners. The evidence shows that under the rates to Rockford the operators in southern Illinois have been able to steadily maintain a price of $2.25 per ton for their coal, while these interveners have been forced to sell coal produced by them for delivery at Rockford at prices as low as $1.40 per ton. (R. 111.)

The right stated by this Court in the case of *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, for a carrier to adopt such rates as will enable it to obtain or retain desired traffic for its own lines is not a real right, if its rates which are not unlawful can be cancelled by the Commission on the cry of "rate war" raised by some witness on the basis of the fears and conjectures of such witness.

The railroad appellants argue that the Commission did not arbitrarily disregard the distances from the Milwaukee mines via its line to these destinations, but that the Commission properly ignored the distance via the Milwaukee and considered only the average distances from all the mines in the Brazil-Clinton and Linton-Sullivan groups. The sole question before the Commission was the lawfulness of the rates published by the Milwaukee for the services performed by the Milwaukee. Section 15 (7) of the Act provides for a hearing to determine the lawfulness of the suspended rate, while Section 1 (5) of the Act, which the Commission finds to be violated by these rates, clearly states that the charge must be reasonable for the service rendered or to be rendered, and only such charges as are not just and reasonable for such service are unlawful. The sole question at issue, therefore, was the lawfulness of the charge of the Milwaukee for its service via its single line for the distances from the points of origin to the various destinations involved. The question was not—would the $1.70 and $1.75 rates be a just and reasonable rate for the service of the other carriers from mines on their lines in the Brazil-Clinton and Linton-Sullivan groups to these destinations, but are such rates just and reasonable for the service performed by the Milwaukee in transporting coal from mines on its lines in Indiana to those destinations. The lawfulness of the rates can only be determined by a consideration of the service for which the rates were

charged. The court properly limited its consideration to the charge of the Milwaukee and the service of the Milwaukee. The Commission erroneously refused to consider the service of the Milwaukee in connection with the rate.

Appellants say (Railroad brief, page 73):

> "The proposed rates can properly be considered as group rates and not merely point to point rates from mines on the Milwaukee. The Indiana Coal Trade Association took no such narrow view of the case as the Milwaukee did, but took the position that the proposed reductions could be justified for application to all mines in the Brazil-Clinton and Linton-Sullivan groups, and its exhibits showed average distances from all mines in those groups as well as from the distances of the Milwaukee mines alone."

The Coal Trade Association of Indiana introduced evidence in regard to the individual rates of the Milwaukee to show that the suspended rates were just and reasonable. It also introduced evidence to show that even if considered as group rates from the Brazil-Clinton and Linton-Sullivan groups such rates would not be less than the rates from the Illinois groups to these destinations. In other words, the Coal Trade Association introduced evidence on both theories that either standing alone or as group rates the rates published by the Milwaukee were proper.

In the *13th Section Case*, 182 I. C. C. 537, the question was whether the rates generally from the Illinois groups discriminated against the interstate rates from the Indiana groups to Rockford and Freeport and did not involve the rates of the individual carriers. In that case it was doubtless proper for the Commission to consider the average distances from the Indiana groups. In the case at bar, however, the sole issue was the lawfulness of the individual rates of the Milwaukee, and the comparison of those rates with the average rates from Illinois was proper. It makes

no difference whether the comparison be made with the average of the Illinois rates or the individual rates in Illinois shown in the exhibits in this case, because either comparison shows that the rates published by the Milwaukee are relatively higher than the great majority of the Illinois rates to these destinations. The action of the Commission in refusing to consider the service performed by the Milwaukee in determining the lawfulness of the rates published by the Milwaukee was in and of itself such an error that its order should be set aside by the courts.

Appellants quote from the evidence of the witness for the Coal Trade Association of Indiana that distance is not the controlling factor; that there are competitive conditions which must be taken into consideration. There is no evidence in this case except in regard to the question of distance. No evidence was given as to what the competitive conditions were, or as to how or to what extent they affected rates, and while, as this Court has said, distance is only one element to be considered in fixing rates, when there is no evidence of any other element in the record before the Commission, the Commission is confined to that single element of rate making.

The brief filed by appellants, the United States and the Interstate Commerce Commission presents the same general arguments as the brief for Railroad appellants. It would unduly lengthen this brief to reply in detail to the arguments in both briefs. What we have said in reply to the Railroad appellants is equally applicable to the brief of the other appellants.

We submit that the Findings and Decree of the District Court are in accord with the facts appearing in this record and with the law.

CONCLUSION.

We submit that the Commission, in determining the lawfulness of a suspended rate, must consider the measure of that rate for the service performed for the rate, and that the Commission misconceived its power when it refused to consider the distances via the Milwaukee in passing upon the lawfulness of the rates of the Milwaukee.

We further submit that the Milwaukee has the right to initiate and maintain any rate it believes beneficial to it so long as such rate does not violate any specific prohibition of the Act.

We further submit that the Milwaukee cannot be required to maintain rates relatively higher than other carriers in the same general territory, whether such general level of rates be high or low, in order to maintain a rate structure that is not fixed and constant, or to maintain groups or structure which are not affirmatively shown of record to be just and reasonable.

We further submit that the findings and order of the Commission in this case are not supported by competent substantial evidence, are in many respects contrary to the evidence, and that in making such findings the Commission has failed to consider material uncontradicted evidence appearing of record; that by reason thereof the order of the Commission is void and was properly set aside by the District Court.

Upon the record in this case and the law applicable thereto the District Court could not properly reach any other conclusions than the following which it made herein:

> "I. That the order of the Interstate Commerce Commission of November 8, 1933, as affirmed April 18, 1934, is not supported by substantial evidence.
>
> "II. That there was no substantial evidence in the

record to justify a finding by the Interstate Commerce Commission that the rates proposed were unlawful in violation of the Interstate Commerce Act." (Rec. 56.)

We submit, therefore, that the decree of the District Court should be affirmed.

Respectfully submitted,

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